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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1457

WILSON RICHARDSON, A/K/A BUDDY, PETITIONER

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit dated and entered in this case on December 26, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals was filed on December 26, 1978, and is not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether petitioner suffered substantial prejudice under the circumstances disclosed in the record from being convicted of a conspiracy by evidence which related to a separate and distinct conspiracy from that charged in the indictment, there being no proof of the conspiracy as charged.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V.

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

STATEMENT OF THE CASE

Petitioner was indicted in May of 1977 by a Federal Grand Jury, along with one Levi Leysath, under an indictment charging conspiracy to distribute heroin and distribution of heroin, in violation of Title 21, U.S. Code, Section 812(a)(1), and 846, and Title 18 U.S. Code, Section 2. Count One, the conspiracy count, charged that "defendants, Wilson Richardson and Levi Leysath, and various other persons unknown" did conspire to distribute heroin, from about February 1, 1977 until about April 14, 1977. The only overt act charged in furtherance of the conspiracy was that the defendants met in the vicinity of Read Street on April

4, 1977, and that Levi Leysath obtained six grams of heroin from a child pointed to by Wilson Richardson.[1]

The case came on for trial in the United States District Court on June 6, 1977. The evidence adduced on behalf of the Government failed to establish the conspiracy between petitioner and Leysath as charged. The trial judge recognized this failure of proof but, nevertheless, denied petitioner's motion for acquittal and left for the determination by the jury whether the Government proved a conspiracy to distribute heroin between petitioner and the witness, Holliday, notwithstanding there was no such conspiracy charged. The trial judge instructed the jury as to the conspiracy count as follows: (Tr. 199, L. 16).

"Now, in connection with the first count, which is the conspiracy count, I explained conspiracy to you yesterday, which is an agreement, an unlawful agreement, but in connection with this particular indictment, and the testimony that has been presented, there is no testimony to support the Government's claim that there was a conspiracy between Wilson Richardson and Levi Leysath, because the testimony of both of those people deny that there was any type of an agreement and the most that could be said, if you took it in the light most favorable to the Government, is that one was a buyer, and the other was a seller. So, that does not prove conspiracy as between Mr. Richardson and Mr. Leysath. That leaves the question for you to decide under all the evidence in the case, as to whether the Government has proved beyond a reasonable doubt that there was a conspiracy to distribute heroin between the Defendant, Richardson, and the Witness, Holliday. And we will go into that as to what conspiracy means. But in con-

[1] Count Two charged only Leysath with distribution. Count Three charged both petitioner and Leysath with distribution. Holliday is not named in the indictment.

nection with the first count, I rule, as a matter of law, that there was no conspiracy regarding Mr. Richardson and Mr. Leysath, but it's for you to decide whether there was a conspiracy between Mr. Richardson and Mr. Holliday."

Petitioner was convicted under the conspiracy count as well as the substantive count. On August 2, 1977, petitioner was sentenced to eight years on the conspiracy count and ten years on the substantive count, said sentences to run consecutively and not concurrently.

Petitioner is twenty-eight years of age and has no previous conviction.

REASONS FOR GRANTING THE WRIT

Petitioner urges the following reasons for granting the writ:

1. The decision of the Court of Appeals recognizing that a variance existed between the conspiracy charged and the conspiracy proved but nevertheless holding this error harmless is not in accord with the principles enunciated in the applicable decisions of this Court, particularly *Kotteakos, et al. v. United States,* 328 U.S. 750, 66 S. Ct. 1239, and *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629.

In *Kotteakos,* this Court overturned the conviction of petitioners of conspiracy to violate provisions of the National Housing Act. The indictment charged a single conspiracy naming thirty-two persons as defendants; the Government, however, proved eight or more distinct conspiracies having a single central figure. The trial court's instruction that the indictment charged but one conspiracy and that the Government would have to prove that each defendant was a member of that conspiracy was held to be erroneous as applied to the proof made and that the error pervaded the entire charge. On this point, the opinion notes: (pg. 1249, 50)

> "The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans. This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character."

By analogy, under the circumstances herein, a single conspiracy was charged, naming only petitioner and Leysath as the conspirators and alleging as an overt act the sale of heroin by petitioner to Leysath on April 4, 1977. Proof of this allegation did not establish the conspiracy, a fact recognized both by the trial judge and the Court of Appeals. The contention of appellant that a variance existed between the conspiracy charged and the conspiracy proved was upheld on appeal, although the error was deemed harmless. As was pointed out in *Kotteakos,* however, notwithstanding that the evidence may have been sufficient to convict in a separate trial, (page 1253).

> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense or in one or more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of Section 269. We think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."

In *Berger v. United States,* supra, in defining the scope of Section 269 of the Judicial Code, as amended (28 U.S.C.A. 391),[2] the Court noted:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Bennett v. United States,* 227 U.S. 333, 338, 33 S. Ct. 288, 57 L. Ed. 531; *Harrison v. United States,* (C.C.A.) 200 F. 662, 673; *United States v. Wills,* (C.C.A.) 35 F. 2d 855, 857. *Cf. Hagner v. United States,* 285 U.S. 427, 431-433, 52 S. Ct. 417, 76 L. Ed. 861."

Although, in *Berger,* a variance was found to exist between the conspiracy count and the proof, it was held not prejudicial under the peculiar circumstances therein, in that the proof disclosed two conspiracies instead of one, each within the words of the indictment. The Court noted that:

> ". . . the objection is not that the allegation of the indictment does not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof included more."

The fact that there was proof of a conspiracy with which Berger was not connected, in addition to the proof connecting him with the conspiracy as charged, was held not prejudicial.[3]

[2] This provision is embodied in Section 52(a) Federal Rules of Criminal Procedure reading: (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Unlike *Berger,* however, the objection here is that the allegations of the indictment do *not* describe the conspiracy of which petitioner was convicted. The indictment charges a conspiracy between petitioner and Leysath to distribute heroin in violation of law, and the one overt act charged in furtherance of that conspiracy was the sale to Leysath on April 4, 1977. The proof was deemed insufficient to establish the conspiracy as such; the conviction of petitioner was as to a separate and distinct conspiracy not embodied within the allegations of the indictment.

Under the circumstances disclosed in the record, it is manifest that substantial prejudice has resulted to petitioner. Unquestionably, he was taken by surprise by the admission of Holliday's testimony. Holliday's statement previously given to the Government was furnished to petitioner's counsel only the evening before he was to testify. The testimony was extremely vague in terms of the times and places of his alleged dealings with petitioner and many apparently related to times other than the period covered in the indictment. There were no specific incidents related to which petitioner could address himself in rebuttal testimony. Petitioner was placed in the awkward position of being unable to defend himself against these general accusations; nor could he reconstruct his whereabouts on the occasions referred to in Holliday's testimony since they lacked specificity as to time and place. The testimony of Holliday was so general that counsel could not have made any meaningful investigation even if a continuance had been granted. (Tr. 150-172.)

[3] Compare *Blumenthal v. United States,* 332 U.S. 539, 66 S. Ct. 248, where petitioner urged that the proof, in variance from the indictment, showed that there was more than one conspiracy. Although insisting that only one conspiracy was proved, the Government conceded that prejudice has resulted if the evidence proved more than one conspiracy.

It is important to note that the testimony adduced by the Government reflects no unity of purpose nor common design among the three alleged conspirators. Holliday's testimony related to incidents wholly disconnected from those specified in the indictment. There was no proof whatsoever of any transaction linking Holliday and Leysath. The proof at best merely established a buyer-seller relationship between the petitioner and Leysath and a relationship of an entirely different character between the petitioner and Holliday. Petitioner's dealings with Leysath were held to be non-conspiratorial; those between petitioner and Holliday, although smacking of a conspiracy, nevertheless were beyond the purview of the indictment.

In view of the material variance between the conspiracy charged and the conspiracy proved, as recognized by the Courts below, substantial prejudice to petitioner results further in that he is accorded no protection from another prosecution for the same offense. *Berger v. United States,* supra.

2. The actions of the Courts below deny petitioner his rights under the Sixth Amendment that

> "In all criminal prosecution, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation;"

and deprive him of his liberty without "due process of law" in violation of his Fifth Amendment rights. As was so aptly stated in *Cole v. State of Arkansas,* 333 U.S. 196, 68 S. Ct. 514:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In *re Oliver,* 333 U.S. 257, 68 S. Ct. 499, and cases there cited. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. State of Oregon,* 299 U.S. 353, 57 S. Ct. 255, 259, 81 L. Ed. 278."

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant this petition for a writ of certiorari and reverse the judgment of the Court below.

Respectfully submitted,

ISADORE S. BERNSTEIN,
Attorney for Petitioner.

APPENDIX

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DECISION OF COURT OF APPEALS

(Argued December 8, 1978. Decided December 26, 1978)

Before HAYNSWORTH, Chief Judge, BRYAN AND FIELD, Senior Circuit Judges.

John W. Foard (R. W. Mance III on brief) for Appellant; Eric Wm. Ruschky, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant, Wilson Richardson, appeals from his conviction on two counts alleging drug-related offenses. He proffers two assignments of error.

We reject his contention that the government presented insufficient proof on the distribution of heroin charge contained in Count III. As to Count I, we agree that a variance existed between the conspiracy charged and the conspiracy proved. However, we hold this error harmless. In so ruling, we are principally impressed by the government's release of Holliday's statement on the day prior to his testimony, the immediate efforts of Richardson's counsel to develop an attack on Holliday's story, and the failure of the defense to come forward at this stage with any evidence discovered after Richardson's conviction indicating prejudice.

AFFIRMED.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1978. The petition for a writ of certiorari was filed on March 21, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was a prejudicial variance between the conspiracy alleged in the indictment and the proof at trial.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of eight years' imprisonment on the conspiracy count and ten years' imprisonment on the distribution count. He was also sentenced to consecutive special parole terms of three years on each count. The court of appeals affirmed (Pet. App. 13).

The indictment charged that petitioner participated in a conspiracy with co-defendant Levi Leysath and various persons unknown to the grand jury.[1] The illegal agreement allegedly extended from February 1, 1977, to April 14, 1977. The government's evidence at trial showed that, on approximately 10 occasions during this period, Leysath, a heroin user, purchased bags of heroin from petitioner at $40 each, and that he sometimes resold the narcotics at a profit (Tr. 124-133). Leysath paid for the heroin when he received it; he testified that he had no express agreement with petitioner concerning what he would do with the narcotics (Tr. 124, 133). John Holliday, another heroin user, testified that from January through March 1977, he sold heroin for petitioner "[q]uite a few times" and split the proceeds with petitioner. Holliday testified that petitioner talked with him about selling heroin and taught him how to package the heroin for sale (Tr. 152-154, 156-158). On February 12 or 13, 1977,

[1]Before petitioner's trial, Leysath pleaded guilty to a count in the indictment that charged him alone with distributing heroin on March 4, 1977 (Tr. 112).

Holliday received $300 worth of heroin from petitioner, sold part of it, and paid petitioner after making the sale (Tr. 156).

In March 1977, Leysath negotiated with Deputy Sheriff Robert D. Watkins and agreed to sell him a quantity of heroin for $750 (Tr. 25, 55-57). On April 3, 1977, the day before the delivery was to take place, Leysath contacted petitioner to make arrangements to purchase the heroin (Tr. 125-126). The next day, in a parking lot in Columbia, South Carolina, Leysath met with Watkins and DEA Agent James H. Williams. Agent Williams posed as Watkins' associate from Atlanta, Georgia, who was there to finance the transaction. Leysath told the agents that he did not have the heroin and that he needed $300 in advance to obtain the narcotics (Tr. 56, 115). Agent Williams gave Leysath $300 and drove with him and Watkins to a cafe where petitioner worked (Tr. 26, 61, 66). Leysath gave the money to petitioner, who then left the cafe. He returned ten minutes later and told Leysath to accompany him outside. There, within view of the agents, who were waiting in Leysath's car, petitioner pointed to a small boy and told Leysath that the boy was holding the drugs (Tr. 28, 68, 119). Leysath took the heroin from the boy, returned to the automobile, and drove to the parking lot, where he gave the heroin to the law enforcement officers and Agent Williams paid him an additional $350 (Tr. 28-30, 33, 80, 121). (The negotiated price of $750 was apparently reduced to $650 because the heroin was of poor quality.)

Petitioner testified in his own behalf and denied that he had had any heroin dealings with Leysath or Holliday (Tr. 188).

At the close of all the evidence, the district court instructed the jury that, because both petitioner and Leysath denied any agreement between them, there was no evidence of their participation in a conspiracy with each other. However, because the indictment charged a conspiracy involving not only petitioner and Leysath but also persons unknown to the grand jury, the court instructed the jury to decide whether there was an illegal agreement between petitioner and Holliday.[2] Petitioner did not object to this instruction, and the jury returned a guilty verdict on both the conspiracy count and the distribution count.

ARGUMENT

Petitioner argues (Pet. 4-9) that there was a prejudicial variance between the conspiracy alleged in

[2]The court stated (Tr. 199-200):

> Now, in connection with the first count, which is the conspiracy count, I explained conspiracy to you yesterday; which is an agreement, an unlawful agreement, but in connection with this particular Indictment, and the testimony that has been presented, there is no testimony to support the Government's claim that there was a conspiracy between [petitioner] and Levi Leysath, because the testimony of both of those people deny that there was any type of an agreement and the most that could be said, if you took it in the light most favorable to the Government, is that one was a buyer, and the other was a seller. So, that does not prove conspiracy as between [petitioner] and Mr. Leysath. That leaves the question for you to decide under all the evidence in the case, as to whether the Government has proved beyond a reasonable doubt that there was a conspiracy to distribute heroin between [petitioner] and the Witness, Holliday. And we will go into that as to what conspiracy means. But in connection with the first count, I rule, as a matter of law, that there was no conspiracy regarding [petitioner] and Mr. Leysath, but it's for you to decide whether there was a conspiracy between [petitioner] and Mr. Holliday.

the indictment and the proof at trial. The indictment charged petitioner, Leysath, and persons unknown to the grand jury with conspiring to distribute heroin. The proof at trial showed that petitioner sold heroin to Leysath on several occasions during the period alleged in the indictment and that on at least one such occasion Leysath resold a substantial quantity of heroin to law enforcement officers. The proof also showed that petitioner sold heroin to Holliday on a number of occasions during the period alleged in the indictment, that petitioner instructed Holliday on the packaging and resale of the narcotics, and that the two shared the sales proceeds. Petitioner does not dispute that the evidence was sufficient to convict him of conspiring with Holliday. Rather, he contends that, because the district court concluded as a matter of law that Leysath was not part of the conspiracy, the conspiracy count should have been dismissed, even though it alleged that petitioner had conspired with persons other than Leysath.

Even assuming the district court was correct in ruling as a matter of law that Leysath was not one of petitioner's co-conspirators,[3] there was still no variance between the allegations in the indictment and the proof at trial. Before trial, the government announced that it intended to call Holliday as a witness. At the same time, the government released Holliday's pretrial statement to petitioner's counsel (Tr. 2). During

[3]Although we believe the district court erred in instructing the jury that the evidence was insufficient to support the allegation that petitioner and Leysath were co-conspirators, the jury was not permitted to return a guilty verdict based on an illegal agreement involving Leysath, and accordingly we do not defend petitioner's conviction by reference to his dealings with Leysath.

trial, the Assistant United States Attorney plainly stated to the court and defense counsel that Holliday was one of the unknown persons to whom the grand jury referred in the conspiracy count of the indictment; Holliday was not named only because his identity was not known to the grand jury at the time the indictment was filed (Tr. 106). Accepting that the district court's view of the evidence was correct, this establishes nothing more than that the government failed to prove one of the allegations in the indictment; it does not show that the defendant was convicted of a conspiracy different from the one charged.[4]

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[4]A variance occurs when the proof at trial departs from the allegations in the indictment, not simply when the proof establishes some but not all of those allegations. For example, a variance occurs when the indictment charges that an act occurred on one date but the proof shows that it occurred on another. A variance does not occur when the indictment charges that the defendant violated a statute in two different ways but the proof establishes that the defendant violated the statute in only one of those ways. See, *e.g.*, *United States* v. *Abascal*, 564 F. 2d 821, 832-833 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States* v. *Laverick*, 348 F. 2d 708, 714 (3d Cir.), cert. denied, 382 U.S. 940 (1965).

The court of appeals thought, however, that there was a variance between the indictment and the proof at trial, and that petitioner and Holliday engaged in a different conspiracy from the one charged (Pet. App. 13). Assuming *arguendo* that there was a variance in this case,[5] the court of appeals correctly rejected petitioner's claim of prejudice. Petitioner knew before trial that the government intended to call Holliday as a witness. Armed with Holliday's pretrial statement, petitioner's counsel was prepared to and did attack Holliday's testimony concerning events that occurred during the course of the conspiracy. Petitioner did not object to Holliday's testimony or to the court's instruction to the jury that it could return a guilty verdict if it found that petitioner and Holliday were co-conspirators. Under these circumstances, the court of appeals correctly sustained petitioner's conspiracy conviction.

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[5]Petitioner apparently does not argue that the indictment charged two separate conspiracies, one with Leysath and one with Holliday, in the same count and was therefore duplicitous. Such an objection would be unavailing in any event, because the district court instructed the jury that it could not convict petitioner of an illegal agreement with Leysath. As the conspiracy count was submitted to the jury, therefore, only the agreement with Holliday was at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

DOJ-1979-05